2004

State of Utah v. Gerald Steven Wallace : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
	:	Case No. 20040877-CA
GERALD STEVEN WALLACE,	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

An appeal from a conviction for three counts of securities fraud in violation of Utah Code Ann. § 61-1-1(2) (2000), selling an unregistered security in violation of Utah Code Ann. § 61-1-7 (2000), selling a security without a license in violation of Utah Code Ann. § 61-1-3 (2000), and a pattern of unlawful activity in violation of Utah Code Ann. § 76-10-1603 (2003), in the Third Judicial District Court, Salt Lake County, Utah, the Honorable Deno Himonas, presiding. The defendant is not incarcerated.

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ARGUMENT

This Reply Brief first responds to the state's Statement of Facts (Point I), and then to its arguments as to insufficient evidence (Point II), ineffective assistance of counsel (Point III), and the illegal sentence (Point IV).

Point 1: Response to Utah's Statement of Facts – Mr. Wallace's Inspection.

The Brief of Appellee, at 4, states that Gerald Steven Wallace, defendant/appellant herein, decided to participate in the business arrangement previously referred to herein as the Program "without performing any investigation." This is not correct. Before the first real estate transaction at issue was executed, Mr. Wallace's real estate agent, Cal Udy, contacted the Utah State Division of Real Estate, faxed it the sales contract, and was informed by a Division investigator that nothing was wrong with the contract. The investigator noted that the transaction, as with every business transaction, might give rise to litigation if the money was not paid. (R. 413, at 269:1-11.) Mr. Udy told Mr. Wallace that he was "completely comfortable with [the investigator's] response and that he had no

problems going forward, and that it was his opinion that everything was just fine." (R. 413, at 356:4-7.) In addition to dealing and sharing information with Mr. Udy, Mr. Wallace also dealt directly with the real estate broker who was Mr. Udy's boss, and who investigated the propriety of the Program before allowing Mr. Udy to participate. No one advised the broker that the deals were suspect despite his extensive inquiry. (R. 413, at 221:1-25, 232:15-233:7, 354:1-19.)

Also before the first real estate transaction, Mr. Wallace's real estate agent, Mr. Udy, met with a FBI investigator along with an investigator from the Utah State Insurance Commission. (R. 413, at 262:7-24.) If the FBI or Insurance Commission investigator had given Mr. Udy any cause to believe that the first transaction should not occur, Mr. Udy would not have participated. (R. 413, at 275:2-5.) Mr. Udy told Mr. Wallace about this meeting as well. (R. 413, at 275:20-25.)

Before the first transaction was executed between Richard Van Roo (seller) and Mr. Wallace (buyer), Mr. Roo had the Senior Vice President of his bank examine the deal. He had an officer at the bank that would be carrying the loan – and thus would be sharing the risk thereon – look at the details. He took the transaction to the accountant with whom he had dealt for twenty years. He also had an attorney look at it. According to Mr. Roo, each one of these professionals advised that there was nothing to be afraid of. (R. 412, at 93:18-94:23.) Mr. Wallace was aware that Mr. Roo had asked at least the bank officer and the accountant about the transaction, and he knew that Mr. Roo was going ahead with the transaction. (R. 413, at 353:9-19, 354:23-355:1.)

Over eighteen months, Mr. Wallace observed the fund operating as Mr. Anderson said it was supposed to, and even spoke with a seller who said she'd participate again if she had any more property. (R. 413, at 371:4-373:13.) It is true that Mr. Wallace took the word of Al Anderson, one of the four people who created and implemented the Program, that they were able to generate enough income off the fund into which the purchase money for each real estate sale was initially placed, to pay the seller a good return on his/her money, as well as to fund the buyer's mortgage obligations. But then so did Mr. Udy. As was the case between Mr. Anderson and Mr. Wallace, Mr. Anderson provided Mr. Udy only the basic details about how the fund supposedly generated enough income to benefit both buyers and sellers. Even though Mr. Udy, like Mr. Wallace, didn't totally understand the details, Mr. Udy was satisfied: "[Al Anderson] just told me that he'd make sure the payments were made, don't worry about it and at that point in time, quite frankly, I totally trusted the man." (R. 413, at 258:1-21.)

Point II: **<u>There Was Insufficient Evidence that Mr. Wallace "Willfully" Misrepresented or Withheld "Material" Information</u>.**

The evidence is insufficient to prove beyond a reasonable doubt that Mr. Wallace willfully misrepresented or withheld material information in violation of Utah Code Ann. § 61-1-1(2) .

A defendant challenging the sufficiency of the evidence bears a heavy burden. A reviewing court views the evidence in a light most favorable to the verdict. A jury verdict will be reversed only where the evidence is so "inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the

defendant committed the crime." *State v. Gonzales*, 2000 UT App 136, ¶ 10, 2 P.3d 954, *quoting State v. Smith*, 927 P.2d 649, 651 (Utah Ct. App. 1996), *cert. denied* 937 P.2d 136 (Utah 1997). Circumstantial evidence may support a verdict where the inferences therefrom are logical and reasonable and, if believed, are sufficient to prove every element of the offense beyond a reasonable doubt. *State v. Lyman*, 966 P.2d 278, 281 (Utah Ct. App. 1998).

Speculation, however, may not support a verdict: "A guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt." *Id.*, *quoting State v. Brown*, 948 P.2d 337, 344 (Utah 1977), *quoting State v. Workman*, 852 P.2d 981, 985 (Utah 1993). A reviewing court is obligated to reverse a jury verdict based upon speculation, or where circumstantial evidence does not permit rational inference sufficient to eliminate all reasonable doubts:

> The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict. The evidence, stretched to its utmost limits, must be sufficient to prove the defendant guilty beyond a reasonable doubt. *State in re J.S.H.*, Utah, 642 P.2d 386 (1982); *State v. Kourbelas*, Utah, 621 P.2d 1238, 1240 (1980).

State v. Petree, 659 P.2d 443, 444-45 (Utah 1983).

The state's theory behind the three securities fraud counts was that Mr. Wallace willfully provided or withheld material information in violation of Utah Code Ann. § 61-1-1(2) (2000). (R. 414, at 421:23-426:6.) While jury instructions 31-33 reflect the

elements of Utah Code Ann. § 61-1-1(2)(material statements and omissions) and § 61-1-1(3)(fraud and deceit), state's counsel, in closing argument, quoted and argued only subsection (2). (*See* R. 414, at 421:23-426:6.) The Brief of Appellee, at 21-24, focuses exclusively upon subsection (2). Utah Code Ann. § 61-1-1(2) reads:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly to:
> . . . .
> (2) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; ....

To violate Utah Code Ann. § 61-1-1(2), one must act willfully. Utah Code Ann. § 61-1-21(2) (2004 Supp.) "Willfully," in this context, does not mean that one must intend to violate the law; but only that one intend the act or omission that causes the violation. *State v. Larsen,* 865 P.2d 1355, 1358 (Utah 1993). Thus, to sustain the three securities fraud convictions, there must be evidence that Mr. Wallace intended to make an untrue statement, or that he intentionally withheld information that would have clarified otherwise misleading statements. To support the securities fraud convictions, the statements and omissions must have been proved beyond a reasonable doubt to have been "material," and made "deliberately and purposefully, as distinguished from merely accidentally or inadvertently." *Id.* at 1358 n.3.

The Brief of Appellee, at 15-28, invokes the doctrine of invited error to argue that Mr. Wallace, having failed to object to the willfulness jury instruction at trial, cannot now argue that it misstates the law. Mr. Wallace does not challenge the judge's charge

to the jury, only that there was insufficient evidence from which a reasonable juror could have concluded that Mr. Wallace willfully said or omitted anything that was material.

The Brief of Appellee, at 30-33, argues that Mr. Wallace failed to marshal the evidence in support of the verdict. *See State v. Waldron*, 2002 UT App 175, ¶ 13, 51 P.3d 21. The evidence favoring the verdict is, in fact, marshaled in the Brief of Appellant, at 28-29. The state's lament goes to the lack of said evidence, not to Mr. Wallace's failure to marshal it.

The Brief of Appellee, at 34-35 identifies the following statements and omissions as supporting the securities fraud convictions: (1) Mr. Wallace's bankruptcy; (2) Mr. Anderson's felony conviction; (3) the risk the managers might abscond with the money, or that the fund was encumbered; (4) pending litigation; (5) a cease and desist order against Mr. Stewart; (6) information about bounced checks; and, (7) a personal guarantee. Each is addressed in turn below.

1. <u>Mr. Wallace's bankruptcy</u>. The evidence before the jury about Mr. Wallace's bankruptcy was not material. Therefore, Mr. Wallace's failure to mention it to the three buyers cannot violate Utah Code Ann. § 61-1-1(2)(2002). To be material, the information at issue must be reasonably calculated to make a difference:

> [M]ateriality is "'something which a buyer or seller of ordinary intelligence and prudence would think to be of some importance in determining whether to buy or sell.'" *Gohler v. Wood*, 919 P.2d 561, 564 (Utah 1996) (*quoting S & F Supply Co. v. Hunter*, 527 P.2d 217, 221 (Utah 1974)).

Hermansen v. Tasulis, 2002 UT 52, ¶ 29, 48 P.3d 235; *accord Yazd v. Woodside Homes Corp.*, 2005 UT App 82, ¶ 9, 109 P.3d 393. Ordinary intelligence and prudence are

gauged against an objective reasonableness standard. *S & F Supply Co. v. Hunter*, 627 P.2d 217, 221-22 (Utah 1974). It might be nice to know whether the person with whom one is dealing is a faithful spouse, an opera aficionado, or a spiritual person, but only that which objectively bears upon a decision to buy or sell is considered material.

While a history of bankruptcy may conjure images of financial irresponsibility, the opposite actually is true. A person who obtains full discharge from bankruptcy has managed, through honesty and discipline, lawfully to wipe clean his or her financial slate clean. *See, e.g.,* 11 USCS § 524(a) (2005). "The purpose of the [Bankruptcy] Act is to release honest debtors from the burden of their debts." *Swanson Petroleum Corp. v. Cumberland*, 167 N.W.2d 391, 396 (Neb. 1969), *quoting Robinson v. J.R. Williams & Co.*, 266 F. 970, 972 (1st Cir. 1920).

A history of bankruptcy may, to the uninformed, imply a motive to defraud. Yet again, especially where the person's debts have been discharged, the opposite is true. Even prior to discharge, being involved in bankruptcy proceedings "in no way demonstrates that the defendant had a particular need for money at the time the crime was committed." *United States v. Reed*, 700 F.2d 638, 642 (11th Cir. 1983). Entering into bankruptcy is precisely the lawful means for "relieving the pressure which might compel him or her to commit a criminal act." *Id.*; *accord United States v. Bensimon*, 172 F.3d 1121, 1129 (9th Cir. 1999). In the context of judicial proceedings, evidence of poverty as financial motive is properly admitted only where it is linked with something more, such as drug addiction or severe, ongoing indebtedness. *United States v. Jackson*, 882 F.2d 1444, 1449-50 (9th Cir. 1989).

The only evidence of Mr. Wallace's bankruptcy in the case at bar was Exhibit 5, introduced and received at trial. These records indicate that Mr. Wallace and his wife filed a bankruptcy petition under Chapter Seven of the Act, and that they successfully secured a complete release from all dischargeable debts on January 7, 1998 – more than two years and seven months before the first transaction was executed. Nothing else the least bit probative of the bankruptcy's materiality was introduced.

One can imagine circumstances under which information about bankruptcy might be material; for example, if bankruptcy were declared in an attempt to fraudulently shield assets. Especially with regard to a bankruptcy fully discharged, however, one can imagine circumstances under which the filing was wholly immaterial; for example, where a family member becomes ill and is not covered by health insurance.

In either scenario, owing to the lack of evidence, a juror would have had to ***speculate*** to conclude beyond a reasonable doubt that Mr. Wallace's bankruptcy would have effected an objectively reasonable seller's decision to participate in the Program.[1] Because there was no evidence before the jury as to the materiality of the bankruptcy, Mr. Wallace cannot be said to have willfully withheld material evidence.

2. <u>Al Anderson's felony conviction</u>. Mr. Wallace knew that Al Anderson was convicted of a felony eight years prior to Mr. Wallace's participation in the Program. Mr. Wallace, however, did not know what the conviction was for. (R. 413, at 367:22-368:16.) Nor did Mr. Wallace know he should have disclosed such information. (*Id.*)

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[1] It was improper for the state to argue during closing that, ***following*** full discharge, bankruptcy proceedings indicate "there's some problems with [Mr. Wallace's] financial circumstances." So too was defense counsel's failure to object.

Absolutely no evidence below, circumstantial or direct, controverts Mr. Wallace's testimony that he did not know he was required to disclose the conviction of a person who would have no legal relation with, or obligation to, the sellers.

The state argues that Mr. Wallace ***should have*** investigated the nature of Mr. Anderson's conviction and, based upon that, informed the sellers of Mr. Anderson's criminal background. (R. 414, at 423:23-424:13.) Responding to Mr. Wallace's testimony that he neither knew what the conviction was for, nor that there was an obligation to inform potential sellers, the state declared, "Well, you'd better find out." (R. 414, at 424:8-9.)

The state's argument merely confirms that Mr. Wallace's failure to investigate and announce was not willful. At worse, the failure to investigate and announce the particulars of Mr. Anderson's prior conviction was reckless; to wit, perhaps Mr. Wallace was "aware of but consciously disregard[ed] a substantial and unjustifiable risk that the circumstances exist or the result will occur." Utah Code Ann. § 76-2-103(3).[2] No

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[2] § 76-2-103. Definitions. A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as

evidence exists that Mr. Wallace willfully refused to investigate and announce in order to facilitate the real estate transaction.

3. **Representations that the fund was "unencumbered"; and the risk that fund managers might abscond with the money.** Perhaps the most far-fetched allegations involve the Placement Agreements executed in each transaction (Ex. 11, 21, 29), which recite that money in the fund would remain "unencumbered," and Mr. Wallace's alleged failure to warn others that someone might abscond with the sellers' money placed in the fund. No evidence exists that fund assets were encumbered by, for example, a mortgage or lien, or that the assets were being used to secure debt elsewhere. Thus the state's allegation regarding encumbrance fails from the start. This reply brief, however, will address these claims as allegations that Mr. Wallace withheld information about the general integrity of the fund.

First and foremost, Mr. Wallace had no more knowledge than did the sellers with whom he dealt that fund principals might steal from the fund. That someone with access to money, whether an attorney, broker, employee or sales clerk, might steal it is an unavoidable fact of life of which everyone, buyers and sellers alike, must be aware. Mr. Wallace, however, based upon his investigation and that of his real estate agent, not only purchased real estate in reliance upon the integrity of the fund, he also urged his four

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viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

siblings to do so. Each also took out second mortgages to free up more capital to deposit into the fund – by which they assumed roles similar to that of the sellers. Due to the subsequent theft of fund assets, Mr. Wallace, his brothers and a sister lost their homes, cars and favorable credit ratings. They were financially devastated. (R. 413, at 357:6-21, 370:6-19.)

The state argues this only proves Mr. Wallace was not an effective swindler. The state misses the point. Mr. Wallace's faith in the fund's integrity only corroborates the evidence that he misunderstood the risk.

Perhaps he should have better understood the risk. But there is absolutely no evidence, circumstantial or otherwise, that he did. At worst, Mr. Wallace's failure to warn about a risk he did not understand was criminally negligent or reckless. Utah Code Ann. § 76-2-103(3), (4). It was not, and could not have been, willful.

4. Pending litigation against the fund, McAllister, Stewart and others. The state argues that Mr. Wallace's failure to inform the sellers about a lawsuit involving the fund, Mr. McAllister and Mr. Stewart, constitutes a material omission. The lawsuit was *Gleave v. Attorneys' Title Guaranty Fund, Inc.*, Case No. 000800059-PR (8th Jud. Dist., Duchesne County 2000). Mr. Wallace, however, did not know about the lawsuit, nor did he have any reason to believe it was necessary to check with every government agency to determine whether the fund or its principals were involved with litigation. (R. 413, at 368:17-24.) No evidence suggests that Mr. Wallace had knowledge of the lawsuit.

As was the case with Mr. Anderson's felony conviction (section 3, *supra*), the state argued in closing that Mr. Wallace ***should have*** investigated whether anyone

involved with the Program had been sued. The state also argued from Exhibit 9, the Verified Complaint filed in *Gleave.*[3] (R. 414, at 425:23-426:6.)

Once again, Mr. Wallace's failure to check every government agency to determine whether any proceedings involving the fund or fund principals constitutes, at worst, criminal negligence or recklessness. Utah Code Ann. § 76-2-103(3), (4). His failure to disclose what he did not know could not have been willful.

Moreover, the docket from *Gleave* establishes that when the three real estate transactions at issue were completed, two in September 2000, and the other in January 2001, *see* Exhibits 10, 20, 26, nothing probative of the defendants' wrongdoing had occurred. (The docket from the filing of *Gleave,* through and including April 10, 2001, is attached hereto as Exhibit 1.) Interestingly, on July 26, 2000, the docket reflects that all claims against the fund were dismissed. Ex. 1, at 3.[4] On August 14, 2000, a preliminary injunction hearing was continued because the parties had reached a stipulation. *Id.* at 4-5. On January 29, 2001, the parties informed the court that the case had been settled. *Id.* at 5-6. Not only does Mr. Wallace's failure to research the

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[3] The *Gleave* complaint was admitted as Exhibit 9 without objection from defense counsel. A complaint is written to tell but one side of the story. It is a tool of advocacy. That a lawsuit was filed might conceivably have been relevant (*but see* discussion, *infra*). A complaint, however, is intended to be prejudicial to the defendant. Its introduction into evidence below likely violates Utah R. Evid. 403 and 802. Defense counsel provided ineffective assistance by not objecting to its admission.

[4] Improper was the state's argument regarding "significant litigation" against defendants including the fund. (R. 414, at 425:23-426:6.) Defense counsel provided ineffective assistance by not objecting thereto. Then, even defense counsel erroneously referred to a lawsuit against the fund during closing argument. (R. 414, 434:10.)

Duchesne County court records fail to constitute a "willful" omission, the documents he would have found would have disclosed nothing material.

5. A cease and desist order against Paul Stewart. The state argues that Mr. Wallace willfully failed to discover and announce to the three sellers a cease-and-desist order issued against Mr. Stewart. The Emergency Order and Order to Show Cause were admitted at trial as Exhibit 7.

Mr. Wallace, however, did not know about the order when the three transactions occurred. (R. 413, at 369:20-22.) No evidence exists to the contrary. Mr. Wallace's failure to discover this information might, at worst, constitute criminal negligence or recklessness. Utah Code Ann. § 76-2-103(3), (4). His failure to disclose what he did not know simply may not be deemed willful.

6. Information about bounced checks. The Brief of Appellee, at 35, notes that Mr. Wallace did not tell the third seller that two checks written on the fund to the first seller had failed to clear.[5] In fact, the first check was written for $397.65 on December 13, 2000, and was intended to cover the December 2000 interest payment. The second check was written on December 28, 2000 for $402.65. (Ex. 19.) The second was supposed to cover the first, plus the five-dollar service fee the seller incurred when the first check failed to clear (R. 412, at 123:6-124:24).

[5] The two checks in question were written after the second seller's transaction was concluded, and approximately one month before the third seller's transaction was concluded; thus if this omission were deemed both material and willful, it could be used only to support the verdict on the third count of securities fraud.

There exists no evidence, circumstantial or otherwise, that Mr. Wallace knew the December checks were symptomatic of an emerging problem with the fund. In fact, the same seller to whom the two December checks were written received timely interest checks that cleared for the next several months. (R. 412, at 126:6-127:22.) Of note, as soon as Mr. Wallace realized there ***were*** problems with the fund, he was the ***first*** person to notify the second seller of his concerns – in August 2001 – two months ***before*** that seller's first check was even due. (R. 412, at 162:21-163:8.) No inference reasonably flows from the two December checks to establish beyond a reasonable doubt that Mr. Wallace knew in December 2000 that there were problems with the fund, and that he willfully withheld this information from the third seller.

7. **A personal guarantee.** Mr. Van Roo, the first seller, testified that he told Mr. Wallace how concerned he was for the safety of his money in the fund, and that Mr. Wallace responded that the fund was safe. According to Mr. Van Roo, "[Mr. Wallace] says, I can personally guarantee that." (R. 412, at 108:17-22.) Was this a willful misrepresentation aimed at ensnaring Mr. Van Roo, or a sincere, if misguided, assurance? All evidence in the record, circumstantial and otherwise, points to the latter.

When the two checks made payable to Mr. Van Roo failed to clear in December 2000, Mr. Wallace covered them from his own account. While there is no evidence in the record as to why or how it came about, Mr. Wallace ensured that Mr. Van Roo's monthly payments were covered on other occasions as well. *See* Ex. 19 (check nos. 537, 557, 421375348, 1014 and 491, totaling $6,649). When Mr. Van Roo had trouble communicating with the fund principals, he would call Mr. Wallace: "Whenever there

was a problem I would call [Mr. Wallace]. He was good about getting back to me." (R. 412, at 126:10-25.)

No evidence exists from which a person could reasonably infer that Mr. Wallace's personal assurance was a willful misrepresentation. The assurance may have been unwise, perhaps even criminally negligent or reckless, but there is no evidence from which a reasonable person could conclude beyond a reasonable doubt that it was a willful misrepresentation.

In sum, none of the statements or omissions the state contends were material and willful in violation of Utah Code Ann. § 61-1-1(2) were both material and willful. Quite simply, this is because Mr. Wallace, as a buyer, was every bit as taken in and victimized by the men who created and operated the Program as were the sellers.

Point III: Mr. Wallace Did Not Receive Effective Assistance of Counsel.

The Brief of Appellee, at 28-30, argues that Mr. Wallace failed to preserve the sufficiency argument below. The Brief of Appellant, at 38-42, argues that, despite the failure to move for dismissal for insufficient evidence, defense counsel nonetheless put the court on notice when he raised the affirmative defense of lack of intent. If this court concludes that defense counsel failed to preserve this important issue for appeal, then certainly he provided ineffective assistance.

The federal and Utah Constitutions guarantee an accused's right to effective assistance of counsel. U.S. Const. amends. VI and XIV; Utah Const. Art. I, § 12; *see Strickland v. Washington*, 466 U.S. 668 (1984). A defendant claiming ineffective

assistance of counsel "must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Montoya*, 2004 UT 5, ¶ 23, 84 P.3d 1183, *quoting Wickham v. Galetka*, 2002 UT 72, ¶ 19, 61 P.3d 978.

Point II, *supra,* establishes the merit of Mr. Wallace's insufficiency claim. To summarize, none of the alleged misstatements or omissions were willful ***and*** material. Yet, defense counsel may have failed to preserve the issue with a motion to dismiss at the close of the state's case-in-chief or Mr. Wallace's. This is a motion routinely made, in nearly every case, out of the jury's presence. Judges and prosecutors expect it. No conceivable tactical advantage lies in omitting it – especially when it has merit. This blatant error was exacerbated by the shortcomings mentioned in notes 1, 3 and 4, *supra.*[6]

If by his failure to preserve the insufficiency issue at trial, defense counsel has prevented its consideration on appeal, Mr. Wallace has been prejudiced.

Point IV: <u>The Imposition of 144 Months of Probation Was Illegal.</u>

The imposition of 144 months of probation was illegal. This court need not reach the issue of whether Utah law permits consecutive terms of probation because the court below never made clear its intention to do so. *State v. McDonald*, 2005 UT App 86, 110

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[6] Defense counsel fleetingly referred to the issue of willfulness during his close when he said: "If you look at [Jury] Instruction No. 30, you look at willfully which talks about the mental state and I'll get back to that in a little bit...." (R. 414, at 437:15-17 [in fact, Instruction No. 35, not No. 30, formally defined "willfully"].) But defense counsel never again referred to the definition of willfulness. Nor did he argue word-one about the materiality of the same information.

P.3d 149; *State v. Denney*, 776 P.2d 91 (Utah Ct. App.), *cert. denied* 779 P.2d 688 (1989).

Mr. Wallace was sentenced to four one-to-fifteen-year sentences for second degree felonies, and two zero-to-five-year sentences for third-degree felonies, to run consecutively. (R. 381-82.) This creates a potential range of incarceration of from four to seventy years. The court, however, suspended the prison sentences and imposed 144 months of probation. (R. 383.) The state suggests this reflects the court's intent to impose six consecutive twenty-four month terms of probation. Brief of Appellee, at 48. In fact, there was no such rhyme or reason underlying the court's decision. The following exchange from the sentencing hearing establishes that the court's overriding concern was that Mr. Wallace pay restitution:

> The Court: ... I'm going to suspend the entirety of all of the sentences. I'm not imposing a fine. I'd rather see any money go towards restitution in this case rather than the payment of any fine. I don't want you on probation for 36 months. Probation is going to be a lot longer than that. ***I want it longer intentionally so that we're giving you as long an opportunity as possible to make restitution payments.*** How far can I set it with six consecutive felonies?
>
> Mr. ?: Well, I think you can run it 36 months –
>
> The Court: Currently on each one?
>
> Ms. Barlow (the prosecutor): Mr. Harrison is on probation for 12 years.
>
> The Court: That's what I'm inclined to do in this particular case as well. Place you on probation for a period of 144 months, a 12-year period. I'm going to order restitution....

(R. 415, at 11:3-18 [emphasis added].) Mr. Harrison, by contrast, had pled guilty to two second-degree and two third-degree felonies. (R. 412, at 282:10-11.) The court

ultimately ordered Mr. Wallace to be responsible for $626,000, jointly and severally with defendants convicted of creating and implementing the Program. (R. 383.)

The trial court imposed 144 months of probation for two reasons. First, it wanted to ensure that Mr. Wallace would repay the sellers as much restitution as possible. Second, the court was told that another person had been sentenced to 144 months of probation and, apparently, that sounded just about right for Mr. Wallace, as well.

Whether Utah law authorizes consecutive terms of probation for multiple convictions remains unsettled. *McDonald*, 2005 UT App 86, ¶ 20. In *McDonald*, the defendant was convicted of fifty-eight class C misdemeanors. *Id.* at ¶ 4. The trial court sentenced the defendant to fifty-eight ninety-day jail sentences, to run consecutively. The trial court suspended all but two days of the jail sentences and imposed fourteen and one-half years of probation, the first two years of which were to be "formal probation." *Id.* at ¶¶ 6, 18. Counsel for both parties reasonably assumed the probation term was calculated from ninety days for each conviction running consecutively – or, fourteen and one-half years. *Id.* at ¶ 18. The defendant challenged the legality of consecutive probation terms. *Id.* at ¶ 17.

On appeal, this court observed that a sentence may not be affirmed based upon speculation about the trial court's intent. An order that sentences run consecutively must be "unequivocal." *Id.* at ¶ 19, *quoting Denney*, 776 P.2d at 93.

This court noted that the statutory maximum for probation upon conviction of a class C misdemeanor is twelve months. *McDonald,* 2005 UT App at ¶ 19, *citing* Utah Code Ann. § 77-18-1(10(a)(i) (2003). It declared that ***if*** consecutive terms of probation

are legal, any such order must specifically state that the sentences are to run consecutively. Because no such order issued in the case on review, the fourteen-and-one-half year probation term was terminated in favor of the twelve-month statutory maximum. *Id.* at ¶¶ 21-22.

The *Denney* opinion is similarly applicable to the case at bar. There, the defendant pled guilty to two third-degree felonies, and was sentenced to consecutive prison terms of zero to five years. The court suspended the prison terms and placed the defendant on probation for thirty-six months. *Id.* at 91-92. At that time, the statutory maximum probation for a felony was eighteen months. *Id.* at 92, *citing* Utah Code Ann. § 77-18-1(10)(a) (1986). Thus it was reasonable to assume the thirty-six-month probation reflected the two suspended sentences that were to run consecutively. The trial court declared as much at a subsequent hearing. *Id.* at 92-93.

The defendant was subsequently arrested for violating probation sometime after the first eighteen months of probation, while the second eighteen-month term was running. The defendant moved to terminate probation based upon his having completed the statutory maximum eighteen-month period. The trial court denied the motion, revoked the defendant's probation, and imposed the two consecutive prison sentences. *Id.* at 92.

This court acknowledged the trial court's probable intent to impose consecutive eighteen-month probation terms. It found, however, that at the time of sentencing, this intent was not unambiguous. *Id.* at 92-93. Because the trial court did not state, at the time of sentencing, that the thirty-six-month probation term was calculated upon two

consecutive eighteen-month terms, this court held that the defendant's probation had terminated upon reaching the statutory eighteen-month maximum. *Id.* at 93.

In this case, the court's intent to impose consecutive probation terms is more ambiguous than in either *McDonald* or *Denney*. It obliquely referenced consecutive probation terms, but then adopted the exact length of probation already imposed upon another defendant who pled guilty to felonies that corresponded to neither the number nor the severity of those for which Mr. Wallace was convicted. The court provided no unequivocal indication of its intent to impose consecutive probation terms.

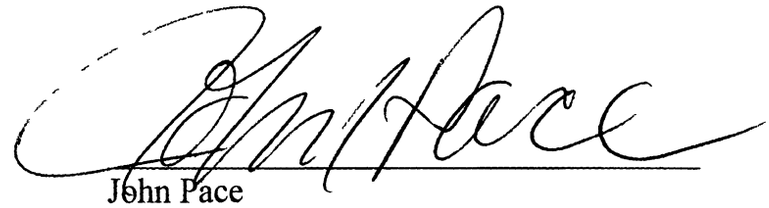
This court, therefore, must vacate the probation order and impose the current thirty-six-month maximum for felony convictions. Utah Code Ann. § 77-18-1(10)(a)(i) (2003). In so doing, the state remains free to seek an extension of probation as provided by Utah Code Ann. § 77-18-1(12) (2003). More immediate to the trial court's central concern that Mr. Wallace continue paying down the total restitution balance, the trial court "may retain jurisdiction of the case and continue the defendant on bench probation for the limited purpose of enforcing the payment of the account receivable." Utah Code Ann. § 77-18-1(10)(a)(ii)(A) (2003), *citing* Utah Code Ann. § 76-3-201.1 (2003)(defining accounts receivable to include unpaid restitution).

CONCLUSION

The three convictions for violating Utah Code Ann. § 61-1-1(2) should be reversed for insufficient evidence. In the alternative, the convictions should be vacated and the matter remanded for a new trial based upon the ineffective assistance of counsel.

If the three convictions are either reversed or vacated, the conviction for engaging in a pattern of unlawful activity in violation of Utah Code Ann. § 76-10-1603 (2003) must also be reversed because the remaining convictions fail to establish a pattern of unlawful activity. The convictions for selling an unregistered security in violation of Utah Code Ann. § 61-1-7 (2000), and for selling a security without a license in violation of Utah Code Ann. § 61-1-3 (2000), should be reversed for the reasons stated in the Brief of Appellant. In any event, the judgment imposing 144 months of probation should be reversed and the thirty-six-month statutory maximum imposed in its place.

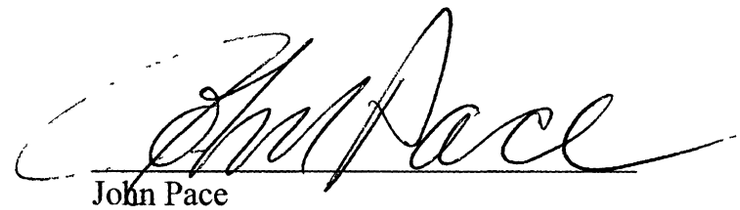
DATED this 15th day of August, 2005.



John Pace
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOHN PACE, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 841114-0230, and four copies to the Office of the Utah Attorney General, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 15th day of August, 2005.



John Pace

DELIVERED to the Utah Court of Appeals and to the Office of the Utah Attorney General as indicated above this _____ day of August, 2005.

_____

EXHIBIT 1

EIGHTH DISTRICT COURT-DUCHESNE
DUCHESNE COUNTY, STATE OF UTAH

CONSTANCE GLEAVE vs. JOHN 1-10 DOES

CASE NUMBER 000800059 Property Rights

CURRENT ASSIGNED JUDGE
A. LYNN PAYNE

PARTIES

Defendant - ATTORNEY'S TITLE GUARANTY FUND
Represented by: DAVID E WEST

Defendant - ATTORNEY'S TITLE GUARANTY FUND
Represented by: JEFFREY J HUNT

Defendant - MORONI 1901 TRUST
Represented by: STEPHEN G STOKER

Defendant - FIDELITY TITLE A UT CORP.

Defendant - GARY MICKELSON
Represented by: STEPHEN G STOKER

Defendant - L. DALE MCALLISTER
Represented by: STEPHEN G STOKER

Defendant - GLENN FRANDSEN

Defendant - DAVID CASSETT
Represented by: STEPHEN G STOKER

Defendant - PAUL STEWART
Represented by: STEPHEN G STOKER

Defendant - JOHN 1-10 DOES

Plaintiff - CONSTANCE GLEAVE
Represented by: JAY D GURMANKIN
Represented by: DANIEL W JACKSON

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	376.10
	Amount Paid:	376.10
	Credit:	0.00
	Balance:	0.00

CASE NUMBER 000800059 Property Rights

REVENUE DETAIL - TYPE: JURY DEMAND - CIVIL

Amount Due:	50.00
Amount Paid:	50.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S

Amount Due:	120.00
Amount Paid:	120.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	3.00
Amount Paid:	3.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CROSSCLAIM 10K-MORE

Amount Due:	90.00
Amount Paid:	90.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: POSTAGE-COPIES

Amount Due:	26.35
Amount Paid:	26.35
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

Amount Due:	8.00
Amount Paid:	8.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: MISCELLANEOUS FEE

Amount Due:	31.00
Amount Paid:	31.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: MISCELLANEOUS FEE

Amount Due:	5.00
Amount Paid:	5.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES

Amount Due:	18.00
Amount Paid:	18.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due:	4.00
Amount Paid:	4.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	20.75
Amount Paid:	20.75
Amount Credit:	0.00
Balance:	0.00

CASE NOTE

PROCEEDINGS

07-17-00 Case filed by maxinep
07-17-00 Judge PAYNE assigned.
07-17-00 Filed: Demand Civil Jury
07-17-00 Fee Account created Total Due: 50.00
07-17-00 Filed: Ex Parte Motion for Temporary Restraining Order and Preliminary Injunction
07-17-00 Filed: Memorandum in Support of Plaintiff's Ex Parte Motion for Injunctive Relief
07-17-00 Filed: Lis Pendens
07-17-00 Filed: Lis Pendens
07-17-00 Filed: Lis Pendens
07-17-00 Filed: Lis Pendens
07-17-00 Filed: Lis Pendens
07-17-00 Filed: Lis Pendens
07-17-00 Filed: Lis Pendens
07-17-00 Filed: Notice of Hearing on Motion for Preliminary Injunction
07-17-00 Filed: Complaint No Amount
07-17-00 Fee Account created Total Due: 120.00
07-17-00 JURY DEMAND - CIVIL Payment Received: 50.00
Note: Code Description: COMPLAINT-NO AMT SPC
07-17-00 COMPLAINT - NO AMT S Payment Received: 120.00
07-17-00 HEARING/PRELIMINARY INJUNCT. scheduled on July 31, 2000 at 02:30 PM in COURTROOM with Judge PAYNE.
07-26-00 Filed: Notice of Dismissal against defendant, FIDELITY TITLE.
07-26-00 Filed return: Summons and Return of Service (Fidelity Title)
Party Served: FIDELITY TITLE A UT CORP.

Service Type: Personal
Service Date: July 20, 2000

07-30-00 Minute Entry - MINUTES PHONE CONFERENCE/SCHEDULING
Judge: A. LYNN PAYNE
Clerk: patm
On 7-28-2000 the clerk received a telephone conference between Evan Schmutz, attorney for Plaintiff and Stephen Stoker who will be representing several of the defendant's. Mr. Schmutz told the clerk that Mr. Stoker could not be present on 7-31-2000 and asked that the matter be continued. The next available day is 8-17-2000. The parties both said that date would be good for them. They expect this hearing to be 2 to 3 hours. Matter is scheduled at 2:30 to follow the law and motion calendar.

07-30-00 Notice - NOTICE for Case 000800059 ID 1040268
HEARING/PRELIMINARY INJUNCT..
Date: 08/14/2000
Time: 02:30 p.m.
Location: COURTROOM
EIGHTH DISTRICT COURT
21554 W. 9000 S. P.O.. Box 990
DUCHESNE, UT 84021
Before Judge: A. LYNN PAYNE
The reason for the change is Date for event has been amended.
As per a phone conference on 7-28-2000 this matter was rescheduled for 8-14-2000.

07-30-00 HEARING/PRELIMINARY INJUNCT. scheduled on August 14, 2000 at 02:31 PM in COURTROOM with Judge PAYNE.

07-31-00 Filed return: Summons
Party Served: FRANDSEN, GLENN
Service Type: Personal
Service Date: July 20, 2000

08-04-00 Filed return: Summons - Attorneys' Title Guaranty Fund, Inc.
Service Type: NonPersonal
Service Date: July 25, 2000

08-09-00 Note: HEARING/PRELIMINARY INJUNCT. calendar modified.

08-09-00 Note: HEARING/PRELIMINARY INJUNCT. calendar modified.

08-10-00 Filed return: Summons - L. Dale McAllister
Party Served: MCALLISTER, L. DALE
Service Type: Personal
Service Date: August 01, 2000

08-14-00 Minute Entry - Minutes for PRELIMINARY INJUNCTION
Judge: A. LYNN PAYNE
Clerk: patm
PRESENT

Audio
Tape Number: 2 Tape Count: 448

HEARING

TAPE: 2 COUNT: 448
This matter was scheduled for a preliminary injunction. Parties contacted the clerk and said they had reached a stipulation and asked for today's hearing to be stricken.
Based on this information the Court ordered this matter stricken.

01-10-01 Notice - NOTICE for Case 000800059 ID 1107732
TELEPHONE CONFERENCE/ is scheduled.
Date: 01/16/2001
Time: 01:15 p.m.
Location: COURTROOM
EIGHTH DISTRICT COURT
21554 W. 9000 S. P.O.. Box 990
DUCHESNE, UT 84021
Before Judge: A. LYNN PAYNE

Telephone conference to schedule preliminary injunction hearing. Mr. Hussey is to initiate the call with all parites to the court. 435-738-2753.

01-10-01 TELEPHONE CONFERENCE/ scheduled on January 16, 2001 at 01:15 PM in COURTROOM with Judge PAYNE.

01-16-01 Notice - NOTICE for Case 000800059 ID 1109395
TELEPHONE SCHEDULING CONF. is scheduled.
Date: 01/29/2001
Time: 01:15 p.m.
Location: COURTROOM
EIGHTH DISTRICT COURT
21554 W. 9000 S. P.O.. Box 990
DUCHESNE, UT 84021
Before Judge: A. LYNN PAYNE

Telephone scheduling conference - Preliminary Injunction

01-16-01 TELEPHONE SCHEDULING CONF. scheduled on January 29, 2001 at 01:15 PM in COURTROOM with Judge PAYNE.

01-17-01 Filed: Notice of Telephonic Scheduling Conference

01-19-01 Filed: Notice of Rescheduled Telephonic Scheduling Conference

01-29-01 Minute Entry - Minutes for TELEPHONE SCHEDULING CONFERE
Judge: A. LYNN PAYNE
Clerk: patm
PRESENT

Audio
Tape Number: 1 Tape Count: 3992

HEARING

Mr. Hussey called in, stated the parties have settled the matter, telephone scheduling conference is not needed.

03-14-01 Filed: Notice fo Telephonic Scheduling Conference

03-15-01 Note: Called Mr. Hussey, told him we don't do telephone conferences at 1:30 pm. Needs to reschedule for 1:15. He said he will renotice.

03-15-01 TELPHONE SCHEDULING CONF. scheduled on April 09, 2001 at 01:15 PM in COURTROOM with Judge PAYNE.

03-26-01 Filed: Notice of Rescheduled Telephonic Scheduling Conference

04-09-01 Minute Entry - Minutes for TELEPHONE SCHEDULING CONFERE

Judge: A. LYNN PAYNE
Clerk: patm
PRESENT

Plaintiff's Attorney(s): CURTIS R HUSSEY
Defendant's Attorney(s): STEPHEN G STOKER
Audio
Tape Number: In Chambers

HEARING

TAPE: Chambe This matter is before the Court for telephone scheduling conference. Parties present on the phone are Curtis R. Hussey and Stephen G. Stoker.

Mr. Hussey asked for a hearing on the plaintiffs motion for an injunction hearing. 1/2 day is requested.

Matter is scheduled for 5-31-01 at 1:30 pm. Mr. Hussey will notice the parties for the hearing.

MOTION FOR INJUNCTION is scheduled.
Date: 05/31/2001
Time: 01:30 p.m.
Location: COURTROOM
EIGHTH DISTRICT COURT
21554 W. 9000 S. P.O.. Box 990
DUCHESNE, UT 84021
before Judge A. LYNN PAYNE

04-09-01 MOTION FOR INJUNCTION scheduled on May 31, 2001 at 01:30 PM in COURTROOM with Judge PAYNE.

04-10-01 Notice - NOTICE for Case 000800059 ID 1148309

MOTION FOR INJUNCTION is scheduled.
Date: 05/31/2001
Time: 01:30 p.m.
Location: COURTROOM
EIGHTH DISTRICT COURT
21554 W. 9000 S. P.O.. Box 990
DUCHESNE, UT 84021